No. 197

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1898

FREDERICK BAUSMAN AS RECEIVER OF THE RAINIER POWER AND RAILWAY COMPANY,

Plaintiff in Error,

vs.

SAMUEL DIXON.

In Error to the Supreme Court of the State of Washington

BRIEF FOR PLAINTIFF IN ERROR

THE JURISDICTION OF THIS COURT.

Plaintiff in error, in the lower court defendant, was sued as and alleged to be the federal receiver of a street railway. This he admitted. It was next alleged that his predecessor in office had hired the plaintiff Dixon, and by negligence caused his injuries. Both these things were denied, and defenses were raised of assumed risk and contributory negligence. Motions by defendant for non suit and for a verdict in his favor were overruled. A verdict of $10,000.00 being rendered in favor of plaintiff, the federal receiver appealed to

the Supreme Court of the State of Washington, where he assigned with other errors the refusal to grant a non-suit and to direct a verdict (See original brief in that court now on file). From the adverse judgment of that court he prosecutes his writ of error here.

A motion is made to dismiss this writ on the ground that no federal question is involved.

Plaintiff in error, being a federal receiver, may, in our opinion, seek this court from an adverse decision of the state court of last resort upon the question whether he was negligent as matter of law in the discharge of his duties as an officer. That a federal receiver is a federal officer this court has fully decided under the removal acts, and, if he be an officer for the purposes of one act, we do not see why he should not be for the purposes of another, since it cannot be contended that there is anything in the removal statutes themselves affecting the definition of officer. Of course we are not saying that the officer's right to come here from the state court is to be judged by his right to remove to the circuit court. Not at all. The statutes are different. What is a federal question under one may not be a federal question under the other, but a federal receiver would be an officer under both. The receiver, in a word, is to be viewed very much as a marshal would be in resisting the present motion.

Has, then, the federal officer under the foregoing circumstances a right to have this court review the adverse decision of the state court? If he has such a right, it must, of course, be found in Section 709 of the Revised Statutes, the familiar 25th section of the Judiciary Act. It is accordingly our contention that we come within those provisions of that section which give this court jurisdiction when there is drawn in question the *validity of an authority exercised* under the Uni-

ted States, and when a federal *right*, or *immunity* is set up and claimed under a federal commission held or a federal authority exercised.

As to *validity of authority*, that, we contend, is just as much drawn in question here by our denial that we, the federal officer, had ever employed the plaintiff as in *Buck vs. Colbath*, or *Etheridge vs. Sperry* the validity of a marshal's authority was drawn in question when the other side admitted that he was the officer he claimed to be and had the valid writ he claimed to have and when the only questions involved were the purely legal and general questions whether, in the former case, an officer (of any court) could seize the wrong property, admit the mistake, and yet find justification in a writ not specifying particular property, and, in the latter case, whether the property he seized had already been rightfully or fraudulently conveyed to others by chattel mortgage. As to *right* this is drawn in question here because the federal receiver not only denies the hiring of plaintiff but sets up affirmative defenses of assumed risk and contributory negligence, so that his denials and his affirmative matter clearly constitute a claim set up of due execution of his official functions, a claim of right under a federal authority or commission.

The language of the section, it will be argued against us, allows a federal officer to bring error here to state courts only when the validity of his authority is denied, or when his right, privilege or immunity is claimed *because* he is the officer. We claim that the language means whenever he *is* an officer, *and* claims a right privilege or immunity arising out of his official transactions. The framers of the act never intended, in our opinion, that the suit in the State court against a federal officer, if based on an admission that the officer was the offi-

cer he claimed to be, and that he had the process he claimed to have, would escape the jurisdiction of this court, while assessing damages against him on something inseparable from his official acts, simply because the officer could not say that any particular federal statute protected him and claimed protection *as* an officer under general laws. "Right," in our view, includes any adverse official claim or contention, "immunity," exemption from the claim of plaintiff against him *as* an officer, not mere exemption from the court in which it is prosecuted or from suit at all, "validity," propriety of action or behavior. And this right and immunity are "specially set up and claimed" when the federal officer, though not claiming the protection of any particular statute and though not claiming exemption *because* he is an officer, denies that *as* an officer he is liable and *as* an officer was in the wrong.

Suppose a federal marshal is sued in the State court by an execution creditor for loss of goods held by him for that creditor under levy. He sets up, or the creditor sets up against him to begin with, that he is a federal marshal and that he held the goods as such. His authority, far from being in question for a moment, is as much insisted on by those who sue him as by himself. Nor is the title to the goods in question. The sole defense of the marshal is that he was not to blame for the loss, that he was not negligent. Or, suppose the marshal is sued for the proceeds of a sale by the creditor for whom he made the sale, or by a deputy for compensation, or by a prisoner for mal-treatment. These are cases of official acts which illustrate the receiver's position here. They are not cases in which the marshal can say that any federal statute protects him either from suit in that court or from any liability wherever sued. They are

not like those in which the marshal levies on the wrong goods or arrests the wrong person, in which cases the validity of his authority in the technical sense is more or less obviously called in question. Surely, though, the Judiciary Act allows review here of errors of law in the one class as well as in the other. If right, immunity, and validity are to have a confined, an unnecessarily confined, meaning, the marshal cannot come to this court in cases of the former sort at all.

If the 25th section of the Judiciary Act of 1789 did not mean that we can come here in cases like the present, then during nearly a century it left federal officers, in the situation of this receiver and in the supposed position of the marshal above, at the mercy of state decree. Right of removal under the removal section (12th) of that act they had none. Not until 1875, in section 2 of the removal act of that year, was the right of removal conferred upon federal officers, who then first got it, not by express language but indirectly, through the removal of questions "arising under the laws of the United States," *Fiebleman vs. Packard* 109 U. S. 421, being apparently the first case of that kind. Nay more, under the original judiciary act federal officers were not only unempowered to remove from state to federal circuit courts, but the latter courts could not even get jurisdiction of them in an original suit and in *Slocum vs. Mayberry*, 2 Wheaton at page 10, we find Chief Justice Marshal remarking:

"Congress has refused to the courts of the Union the power of deciding on the conduct of their officers in the execution of their laws, in suits at common law, *until the case shall have passed through the state courts* and have received the form which may there be given it."

It is, accordingly, quite plain that under the original judiciary act a federal marshal or a federal receiver sued in dam-

ages officially for negligence in the discharge of his duties could be sued only in the state court and that from this he could not remove to the lower federal court. In no way could he get to the court of his own government except by writ of error to the highest state court. Now, shall it be said that he could not go there either unless he would allege, what in many cases he manifestly could not, that he was exempt *because* he was the officer, that he could not go there at all if the validity of his authority was conceded, his writs both as to form and extent unquestioned, the jurisdiction of the lower court undenied?

Now, the power to decree a liability involves, like the authority to tax, the power to destroy, and an officer of another government can be annihilated just as much by pecuniary decrees which he cannot dispute as by decrees that deny the existence of his authority or the technical validity of its use. We must, therefore, in getting at what the framers of the Judiciary Act had in mind, remember that in all human probability they had the sagacity to see this, that they did intend to afford to officers of the United States, no matter in what way sued in a state court, a hearing somewhere in their own tribunals, provided they were sued as officers, and that, as they gave none by removal, they bestowed it in appeal. Having this in view we have no hesitation in maintaining that the framers of that famous act believed that they had covered in section 25 every possible situation of a federal officer involved in the courts of a state, and that, whenever he resisted liability as an officer there, he had a right to come here. Otherwise we must believe that they left their officers in many cases subject to being completely penned in the courts of the states.

But, it will be contended, the later removal acts do now

confer this right of removal, so no harm any longer exists. This, in the first place, affords no answer to our argument as to what was meant by section 25 when enacted, and, if it meant what we say it did then, of course it means that today. In the second place, no removal acts have in all cases supplied this right. A marshal, or other federal officer, cannot remove even now if the amount involved be less than two thousand dollars, so that unless our interpretation of section 25 be correct, a federal officer sued in a state court for as much as nineteen hundred dollars cannot even now have his acts reviewed in the courts of the government whose commission he holds, so long as the person suing him admits or alleges that the officer's authority was valid.

The receiver is sued here *as* receiver, and this suit involves a consideration of those duties which this officer of the federal court has taken oath and given bond faithfully to discharge. The judgment, too, must weigh upon, consume, or, perhaps, annihilate the assets in the hands of the federal court. The federal officer, accordingly, seeks an ultimate review in the courts of the government that created him. This, we say, is allowed him by the 25th section.

But, it is next argued, this court cannot go into the question of fact as to whether or not the defendant is liable. Certainly not, if it be a question of fact. Whether the defendant is liable or not is, however, a question of law. To be sure, this court cannot examine the verdict of the jury and say whether or not it is against the weight of the testimony, but it can say whether or not our motions for a non-suit and for verdict for defendant should have been granted. Whether the lower court was right or wrong in denying these was a question of law.

Possibly it is meant by the other side that even the legal

question of the receiver's liability cannot be considered here, but there is no other question in the case. Being inextricably involved with the federal question of course it must be determined. (*Stanley vs. Schwalby*, 162 U. S. 255.)

It may, perhaps, be suggested against us that the claim of our being a federal receiver is not alleged by us. It is alleged, though, by the other side, and, if it would have strengthened our case to make the allegation ourselves, it will hardly be contended that the plaintiff would be allowed to cheat us of that advantage by alleging it in advance and leaving us only the right to admit it. From the view we take of our right to come here under the 25th section, however, it is enough that we are sued *as* receiver, that the judgment is to bind us as a federal officer, and that the whole controversy is over an official act. Denying liability as an officer, the receiver here has "specially set up and claimed" a right and immunity under the statute.

No decisions of this court expressly support our argument. On the other hand no decisions of this court disagree with it. The spirit of those decisions, we contend, is with us, and the manifest purpose of the statute. *Buck vs. Colbath*. 3 Wall., 334, is clearly with us as to when validity of authority is called in question. Indeed, whenever the case is cited that seems to be the point upon which jurisdiction is supposed to have been sustained. "Immunity" in the most technical sense, however, was there claimed in an instruction which the marshal requested of the state court that it had no right to entertain the suit against him at all. That claim of exemption from any suit may have been what sustained the jurisdiction, but we hesitate to think so, as it was plainly untenable. Will it be said that even flimsy pretenses of immunity made below will sustain the jurisdiction above, that a federal defendant

can say the state court has no power to sue him when he knows it has, and knows, too, your Honors will say it has, and yet get a hearing here? In *Etheridge vs. Sperry*, 139 U. S., 266, exactly similar to the *Buck* case, the pretense of total immunity from state process was certainly flimsy, if it was not flimsy in the other and prior case, for in *Buck vs. Colbath* you had already said "we see nothing in the mere fact that the writ issued from the Federal Court to prevent the marshal from being sued in the state court." If, therefore, the marshal in *Etheridge vs. Sperry* got jurisdiction here by claiming that the state court had no jurisdiction to sue him, he got it by a manifestly erroneous, a manifestly untenable claim. As well might the receiver here have claimed that the state court had no power to sue him because he was a federal receiver. This would be a plainly bad contention and yet not more so than the marshal's claim in *Etheridge vs. Sperry* that the state court could not sue him. Surely this court is not going to say that federal officers, who could not otherwise get to this tribunal from a state court, may still do so if they will make untenable and even untruthful denials of the state court's jurisdiction. We therefore conclude that the jurisdiction in *Buck vs. Colbath* and *Etheridge vs. Sperry* was sustained on the question of validity of authority, in which event we deem ourselves supported by those decisions. One other case remains to be mentioned, *Day vs. Gallup*, 2 Wall. 971. That decision contains nothing affecting the present contention and we would not cite it at all if it were not referred to in *Buck* vs. *Colbath* in a way that might mislead, for in that reference the court omits the important fact that the federal marshal had ceased to be a party before the case even reached the State Supreme Court, that it had been dismissed as to him *before it went to the jury*. This fact is distinctly

referred to by Justice Wayne (see pages 98 and 105 of that report). All that was there decided was that the defendants left in the case after the federal officer went out of it could not come here from the state court.

The motion to dismiss should be denied.

BRIEF ON THE MERITS.

To state this case briefly, Dixon, an employee on a street-railway, was injured by the breaking of a trolley-wire. He was thrown by it from a loose box on top of a street-car, where he was engaged in putting a strain on the wire by means of a block and tackle in order to draw it into position. It seems that one of those support wires, technically called span wires, that stretch from poles on the side of a street to the trolley-wires of electric street railways, had become unfastened to the trolley-wire, at a curve and that the latter wire, in consequence, had sagged to the inward side of the curve, while the span wire had fallen upon or towards the ground. It was in pulling the trolley-wire out to its proper arc, where the span wire might be made to meet and be fastened to it again, that the workman was injured. (See cut at page 96).

The accident happened two days after the railway had passed into the hands of Receiver Bausman's predecessor, Backus, and the controversy as to where the fault lies may be summed up as follows:

Dixon maintains that there was a pounded out kink in the trolly-wire at this place rendering it weaker.

On this there appears to be a conflict in evidence, but the jury had, of course, a right to find against us, so it will be useless to resist on this point further. We may now divide the subject thus:

I. Dixon alleges that Receiver Backus or his agents

knew of this treatment of the kink, though pounded out not during the receiver's or even during his predecessor's, the company's, operation of the properties, but during the original construction by the contractor.

We contend that we had no such knowledge, and that the defects were too small (which the jury conceded) for any ordinary inspection to disclose.

II. Dixon, though alleging himself an electrician on the railway, maintains that he was acting out of his usual employment, and was specially ordered to do this work by the manager.

We contend that he was doing what he was paid to do, what he knew how to do, what he did on this occasion without any special order whatever, and what he had been doing for months without objection.

III. Affirmatively we, for our part, maintain that Dixon assumed a position of needless and open risk by pulling on the trolley wire from the top of the car, and, still worse, from the top of a loose box, when he could have done this from the street below with scarcely any risk at all, and then have mounted the car to fasten the wires together.

In the following statement we shall frequently refer to the findings of the jury, not in order that they may be reviewed here, but to illustrate the points of fact involved, the more especially as the opinion of the State Supreme Court itself deals with nothing else.

I. *Our alleged knowledge of the defect.* As to whether the receiver or his servants had any knowledge of defects in the trolley-wire, the facts are as follows: The railway, as to its management, had passed through three stages. *First*, it had been in the hands of one Baker, a contractor, during its original construction (p. 30, 38, 35). *Second*, it passed into the

hands of the Rainier Power and Railway Company. *Lastly*, at the time of the accident, it was in the hands af that company's receiver. The pounding out of the kinks, the negligence relied on here by Dixon, occurred while the road was in the hands of the contractor (p. 30) That the company or its successor, the receiver, ever caused the pounding out will not be claimed by Dixon, and it cannot be claimed, either, that those who did the pounding out ever became the employees of the receiver. The jury specially found that the defect was one which ordinary inspection would not disclose. The names of the contractor's servants, who pounded out the kinks, were Wooding, Stocks and Alexander (p. 113, 30, 36), and Alexander appears to have called the kinks to the attention of the contractor's superintendent, Wolfe. Of these three who did the pounding out Wooding died (p. 113) and nothing further concerning him appears; Stocks, after the contractor's period, became the company's line repairer (p. 43), and Alexander is not shown to have had any further connection with the road. Thus Stocks alone remained with the road after the company took charge. Even he, however, did not remain until the *receiver* came in (p. 51). He left the company some months before the accident (p 51), which, it will be remembered occurred just two days after the receiver was appointed. As to Wolfe, he subsequently appears in the employ of the *company*, but the only definite description of his connection with it appears to have been a job of shovelling snow (p. 69, 70, 75-6), nor did he, either, remain until the receivership (p. 43). Dixon, it is to be remembered, seeks to recover from the receiver *as receiver*, not as the successor and representative, but as himself, the employer and we now find that not one of the servants of the contractor ever became a servant of the receiver. The jury in a special finding (p. 21)

reported that D. Thomas Denny was the receiver's employee who knew of this defect. Now, it is very doubtful whether the jury would have a right to find that Denny was even in the employment of the receiver before the time of the accident, much less that he knew of this pounded out kink. He had been the *company's* manager up to the receivership, but the testimony is that is was not until two or three weeks after the receivership that the receiver employed him and that during the two days from the receiver's appointment to the date of the accident he was at home with a cold (pp. 66, 74). If there is any contradiction to this, it is the solitary statement of Dixon himself (p. 43) which does not appear very positive. But whether Denny was then in the receiver's employment or not, we may now pass to consider whether he knew of this little defect in a whole line of street railway wire. There is not a shadow of testimony to show that he knew of it. There is not a shadow of testimony to show that he ought to have known it. It will not be even claimed that he had anything personally to do with the pounding out and there is nothing to show that his attention was ever called to it. He does not appear even to have been a servant of the contractor under whom this pounding out occurred, and his first connection with the road appears under the company. We have already adverted to the jury's concession (p. 20, No. 7) that ordinary inspection of the wire would not have disclosed this defect. No testimony at all was introduced to show that the receiver or the company before him had failed to make inspection in any degree whatever, so that notice to charge the receiver here must be actual through his agents.

The charge of defects in the wire seems to be confined almost entirely to the defect of a pounded out kink. One witness, however, for Dixon swore to general rottenness, and

the jury especially sound that such was the condition of the wire. The weight of the testimony is certainly against this (pp. 65, 80, 82) but the matter apparently is immaterial because it was the kink that broke (p. 113). Plaintiff, we may add, made no attempt to show that rottenness would be visible so that the employer could by reasonable vigilance provide against it. The defense, on the other hand, proved that such defects are generally not visible (pp. 66, 82), that no accident had ever occurred at this curve before (p. 115), that the wire was purchased of the General Electric Company, a standard company in electrical supplies (p. 64-5), and should have been good for between seven and ten years (p. 83). No attempt was made to fasten any *knowledge* of rottenness on the receiver, or as we have said any want of inspection. It was only of the pounded out kink that actual knowledge was sought through the chain we have described, to be brought home to him through his employees. Nor was any explanation offered why Dixon, an electrician, should not perceive rottenness, if visible, as well as his employer.

II. *As to the scope of Dixon's Employment.* Dixon claims that in making the repairs he was in a special and not in his usual employment, but the testimony stands as follows: Dixon had worked for the railway a considerable time. His official designation, according to the manager (p. 64), was barn foreman, and according to himself (p. 42) he was to take care of the cars, and repair the woodwork, machinery and wiring in the car barn, or, according to his complaint (p. 2, par. 4) he was the *electrician*. About four months before the receivership and the accident, Stocks, already referred to, left the service of the company. Stocks had been doing the line repairs along the road (p. 43). After his departure Dixon, according to the manager's story (p. 64) and the superintend-

ent's (p. 72), was the man on whom this work devolved, and they testified that from that time on he always did it (pp. 78, 65), that he was a perfectly competent man to do it, and one on whom they relied. In addition to this five superintendents of street railways testified, without rebuttal or contradiction, that it is the duty of a barn foreman to do such work without special orders (pp. 64. 84, 87, 92, 94). Finally, that he was working under *general* orders seems to be put at rest by his own admissions (pp. 52, 46), that he had orders from Mr. Denny after Stocks' departure to look after these repairs himself. Nay, we find him by his own story frequently doing work with wires along the line (pp. 99, 51, 44). As he expressed it (p. 52), Denny had told him "whenever there was a break down or anything of that kind, to go and do it," or (p. 46) "any time a little break like that occurred to go out and fix it, or in case a car got off the track, or anything, I should go out and help the men get it on," and, as we shall now see by his own story (pp. 44, 51) and that of his attendant (p. 40), he went out on this occasion without orders from any one in a manner that places it beyond question that he deemed this a part of his business. Backus, the receiver, as appears by the complaint (p. 1, par. 2), was appointed on the 13th of June. The accident occurred on the 15th. The receiver consequently had been in possession, at that time, two days. On the morning of the 15th, a *motorman or conductor* (p. 44. 51) according to Dixon's own story, reported at the car barn that lines were down at the corner of Depot and Stewart streets, where the accident subsequently occurred, and at one other place. Dixon forthwith without orders from any person called one Henry to assist him, took a car used for such work, and went out to make the necessary repairs. This is his own explanation as to why he went out that morning.

Henry, his attendant, tells the same story (p. 40). Nobody tells a different story. The manager (p. 63) and the superintendent (p. 73), even corroborate him by stating that they gave him no order about it at all. But Dixon in his complaint (p. 3, par. 12), alleges that he was expressly directed to go there by Mr. D. Thomas Denny, the company's manager, and the jury in a special finding (p. 19, Nos. 4 and 5) and in the face of the man's own story, found that Dixon was specially directed to go there and by D. Thomas Denny. They also specially found (p. 19, No. 2), in almost equal defiance of the testimony, that to repair the trolly or span wires was no part of Dixon's duties

No attempt was made by Dixon to show that any one else than himself ever did this work after the departure of Stocks. No attempt was made by him to show that this work was work which he did not understand or which he was unequal to performing perfectly well. No attempt was made to show that it involved more hazards than his electrical work at the barn. No attempt was made to show that the work was to be only temporary. What he does attempt to show, in his own testimony only, is merely that it was not often that he had to go out on these errands and that generally, Denny or the superintendent *was with him* when he did, a detail in which the others contradict him (p. 69, 74) and with which his own story in other places does not agree (pp. 124, 43-4). Even he, however, did not claim that Denny or the superintendent went with him always. At no time, moreover, did he ever object to such work (p. 65), and by his own statement (p. 51) Stocks had been gone between two and four months.

III. *As to the alleged contributory negligence.* Now as to the work to be done by Dixon at that place. On this point there appears to be no difference of opinion. He was to

make the trolley-wire taut by the block and tackle, that is, restore it to its true curvature by an outward strain, and then take up and fasten to it the fallen span wire. Here occurs the defense of contributory negligence and of assumed risk. The contention of the receiver is that Dixon could have done the first of these things, that is, could have applied the strain to the trolley-wire and brought it into position, by pulling on the block and tackle *from the street*, that to do so from the top of the car was dangerous, and from the top of the box more dangerous still, and that Dixon should have ascended the car to make the connection between the two wires only *after* having made the trolley-wire taut from below, the chief danger of a break in the latter being while the strain was being applied. This question is not to be confounded with another which occasionally appears in the testimony—as to which is the proper *side* of the wire to stand on in pulling. The controversy here is as to whether Dixon while pulling should have stood on the *street* instead of on the car and on the box also. Eight witnesses discuss this question, three for the plaintiff in opening, five for the receiver in defense, and none for plaintiff in rebuttal. Of the three on Dixon's behalf, one Alexander (p. 34), testifies against him, Dixon himself admitted (p. 48) that it might be done from the street though he said he had never seen it, and the third, Burroughs, (p. 38) admitted it would be *safer* below and that if he stood far enough underneath it wouldn't hurt him," but added, what is not at all at variance with the receiver's contention, *that all the work* could not be done that way. That it was safer to make the trolley-wire taut from below was not denied by anyone. It is observable, moreover, that none of these witnesses for Dixon gave any opinion at all as to whether, in making taut, it was necessary to mount the box also after

mounting the car. The utmost that can apparently be said of their testimony is that it might be usual or permissible to pull from the *car*. The box, according to Dixon (p. 53), usually went with the car, but he does not say that it was ever used before to stand on during the strain. On the other hand, five witnesses for defendant, all experienced men, testify that the safe way, and a perfectly practicable one, is to make the trolley-wire taut from the street and then to mount the car to make the fastening, the principal risk from a break in the trolley-wire being then over. (pp. 80, 83, 88, 93, 95). The box would be useful to mount in making the connection after the wire had been strained from below. The same witnesses unanimously testified that, at any rate, to pull the trolley-wire taut from the top not only of the car but also of the box greatly added to the danger, "a position of very considerable peril" (p. 81). To this no rebuttal was offered. A trolley-wire, it was in evidence, frequently breaks (p. 82) and at all events is liable to do so at a curve (p. 73) and at this curve there was a great strain (p. 37). Now let it be observed that the box was sixteen or eighteen inches high and that the broken trolley-wire struck Dixon on the face or neck (p. 45) and see that if the man had been pulling even from the car top, the wire would have passed over his head. The jury found, (p. 20, No. 7) that Dixon could have drawn the trolley-wire more safely from the street, but added that he could not have completed his work there. They have found epecially (id. No. 12) that if the trolley-wire should break while he was standing on the box he would probably be thrown to the street. It was while the block and tackle was being applied that the break occurred, not in the act of connecting the two wires (p. 3, par. 15). The jury specially found (p. 20, No. 6) that Dixon did not examine the condition of the trolley-wire before ap-

plying the strain to it. They then added (id. No. 7) *that ordinary inspection of it by him would not have enabled htm to perceive the defect*, a finding doubtless supposed by the jury to be friendly to Dixon, but, we cannot help observing just here, exceedingly unfavorable to his charge of negligence against his employer. No testimony whatever was introduced to show that the receiver, or even his predecessor, the company, had failed to inspect the wire.

The receiver moved for non-suit and for a verdict for defendant, both which motions were overruled. The jury returned a verdict of $10,000 for Dixon. The receiver then made a motion for a new trial on the ground of errors of law in the trial, and of the insufficiency of the evidence. This being denied and judgment entered, he appealed to the Supreme court of the state.

SPECIFICATIONS OF ERROR.

The lower courts erred in not directing a verdict for the defendant because:

1. There was no evidence of negligence by defendant or that he knew of the defect that caused the injury.
2. The plaintiff was guilty of contributory negligence.

ARGUMENT.

A long citation of authorities in negligence cases is generally unprofitable. Each case of that sort must stand upon its own facts and we will therefore discuss our specifications of error very briefly. In this discussion, as in our statement of the case, we shall from time to time allude to the findings of the jury, this not by way of inviting this court to review them, but to expose that defiance of the testimony on which

the court below, as well as the jury, must have decided against us.

I.

OUR ALLEGED KNOWLEDGE OF THE DEFECT.

If Dixon can recover in this case, a severe rule indeed is established against employers. No attempt even is made to prove want of inspection. Nay, more, the road had been used safely for nearly a year, had passed through two hands, and even the jury were forced to find (p. 20, No. 7) that the defect complained of is one which ordinary inspection would not disclose.

Now let us look at the obvious law of this thing. If ordinary inspection would not reveal this pounded out kink, then, of course, it was not one of those plain, visible, defects which the law presumes a master sees whether he actually does so or not. But, if it cannot be *presumed* that we saw it, Dixon must show that we actually did see it. Negligence is never presumed. He must show that we either *ought* to have known of this defect or that we did not know of it. To say that we ought to have known of it in the face of the record certainly will not do. Now, then, did we actually know of it, and through whom?

Through Denny, said the jury (p. 20, No 18), and if the court that refused to direct a verdict for us had been called upon to name any other source of our knowledge, it must have given one equally indefensible. We simply ask the court to review our account of this in part I of our statement of the case. There Your Honors will surely perceive that the attempt to fasten knowledge on us through Denny has utterly failed, both because of their failure to connect the contractor with

the receiver through Denny and because of the utter absence of any showing of Denny's ever knowing of the defect himself. Nor is there anyone else than Denny through whom, with the slightest plausibility, this actual knowledge can be made binding upon us.

As we said before, each case of this kind must be judged by its own facts, and never was knowledge actual sought to be fastened upon employer by a more tortuous and shadowy chain than here.

We do not overlook the fact that the servant does not assume the risk of defects that are hidden, but this does not mean that for every defect that is hidden the master is liable. Very far from it. The servant injured by a defect latent gains this in proving it latent, that he has freed himself from the charge of assumed risk, but still he has not gotten so far as to show that the master is in fault. The master may honestly say, "Yes, you could not see the thing and so you are not at fault. But neither am I. I never knew of this condition of affairs or by reasonable inspection could have found it." In other words it is an accident. Thus the language frequently found in the books is perfectly in harmony when they say, in one place, that the master is not liable for defects unless he actually knew of them or by the exercise of ordinary care could have known of them, and in another place, that the servant assumes no risk of defects latent. If the master was liable every time the injury resulted from a latent defect, without regard to his knowledge of it, actual or presumed, he would become an insurer—become liable without a duty omitted.

Some stress was laid by Dixon's counsel in the lower court on the fact that Dixon was not a servant having the duty of inspection. This, for the sake of argument, might

be readily enough conceded. Let it be conceded that it is the master who must inspect. It would not follow either that the master omitted inspection, our want of which is nowhere shown, or that ordinary inspection would disclose it. Cases are scarcely necessary on the law of this branch of the case at bar. As to the duty of *plaintiff* to show want of inspection we may, however, cite the following:

A brakeman was injured by the breaking of a brake-chain and a refusal of non-suit was held error because it was *not proved* that a proper examination had *not* been made; *or that an examination would have discovered the defect..*

DeGraaf vs. N. Y. C. & H. Ry. Co., 76 N. Y., 125.

Speaking for the unanimous court Judge Church says: "Railroad corporations should be held to a high degree of care and responsibility, but there is a point beyond which the requirements would be regarded as unreasonable and oppressive and would in effect make them insurers."

A much later case in the same court is

Carlson vs. Phoenix Bridge Co., 30 N. E., 750

in which the court, distinguishing between a carrier's duty to a servant and that to a passenger, defines the former "reasonable care," and would not hold defendant liable for the breaking of an iron hook though no special test of it had been made after purchase from a standard manufacturer. In our own case the wire was purchased from the General Electric Company, a standard supply company, and should according to the testimony, have been good between seven and eight years.

II.

CONTRIBUTORY NEGLIGENCE.

This is our second specification of error.

Our statement of this branch of the case surely constitutes its own best argument. Some men may question whether Dixon's negligence contributed to the injury, but we do not think reasonable men will. One thing is certain, if he had pulled from the top of the car and not have done so from the top of that box, the wire would have passed over his head. Why stand on the box at all? Why should the servant, doing that which is surely not careful in his work, be held blameless, while the master, as to knowledge of the defect, is to be held guilty here by so ingenious a chain of fact? Are not both equally bound to that only which is reasonable? Why should so much liberality be extended to the one, such severity imposed upon the other? We submit with confidence our narrative of Dixon's conduct and duties and ask whether this man has behaved with reasonable care. He did not even cast his eyes over the wire to see if it was in good condition before applying the strain (p. 20, No. 6). Then he takes the point of highest exposure and, to do the most dangerous part of his work, takes the most dangerous place.

III.

THE OPINION OF THE STATE COURT.

The lower court states (p.) that "there is no error alleged in the instructions." This is a mistake. We alleged error in the State Supreme Court on the refusal of the trial court to direct a verdict. (See our original brief).

It is evident the State Supreme Court did not consider this case from that standpoint to any great extent. They only considered whether the jury had not made good certain deficiencies of the testimony. However, they do state that "there is also evidence that the knowledge of these defects (kinks) was brought home to the managers of the company." Company? The company is not the defendant here. The receiver is the alleged employer. Dixon himself would refuse to accept a verdict against the *company*. It is the receiver and the estate that he seeks to charge with a preferred lien. Our very point always has been this distinction, and that, even if it be possible to trace the knowledge from the contractor's period to that of the company, it is impossible to trace it to the employer *receiver*. Did the State Supreme Court mean that this knowledge reached the manager of the receiver? They did not say so.

In our opinion they could not say so. Never was knowledge of a latent defect sought to be traced to an employer more unfairly after two changes of masters and after a year's operations.

As the state court refers so often to the findings of the jury, we can not avoid making here our perhaps superfluous protest against the manner in which that court attempts to close our lips against the manifest falsity of some of them. A number of the answers or findings, it is plain from the court's own opinion, were unsupported by any testimony whatever. Grant that, says the lower court, you had no business, then, to ask them, and, if you got a false answer, you are bound by it. Why? Is not the admitted purpose of special interrogatories to make the jury so state their views in detail that, if they perversely and erroneously give a verdict to the wrong party, it may be corrected by reference to the

interrogatories answered? If this be true, interrogatories may well be asked on all the points necessary to sustain that verdict. If, in a suit on a promissory note, delivery be in issue and there be no evidence of that, may we not properly ask the jury whether the note was delivered? The expectation is that, answering truthfully, they will say it was not, and then if they return verdict for the other side nevertheless, the special finding will correct the verdict. This is clearly the purpose of interrogatories. (Walker vs. New Mexico etc. Ry., 165 U. S. 593. Bellford vs. Spokane etc. Ry., 9 Wash. St. 55). But, says the State Supreme Court, if there was no testimony on that point at all, you should have moved "for a default." Default, how and when? Nothing in the laws or decisions of the state throw any light on this language. By default, does the court mean non-suit? That we moved and were overruled (p. 60). Does it mean a peremptory instruction? That also we did and it was denied us (p. 107). Does it mean a motion to set aside the verdict? That also we did and to no purpose (p. 21). Does it mean a verdict *non obtante veredicto*? That we did not do, and how could we do it when the jury had protected themselves by making false answers on these very points? As in the supposed case of interrogatories concerning a promissory note, if the jury should falsely answer that the note was delivered when it was not, the answers would be consistent with the general verdict and a motion for verdict the other way upon the answers would manifestly be wrong. We are utterly at a loss to know what we were to do under this moving "for a default."

Why does the lower court seize on the solitary remark of one witness that the wire was generally rotten (against the weight of the testimony) when, at all events, it has conceded that the cause of this man's injuries was not the rottenness but

the pounded out kink. "It is evident that the pounding out of the kinks in the trolley-wire at the point where the accident happened had weakened the wire and was the cause of the same breaking." The cause of the trouble here was this kink and the question is whether the receiver did know of it or ought to have known of it?

The question of contributory negligence is the real question in the case, says the lower court. They concede that some of the jury's findings are upon our side of the question. This is another way of saying that a good deal of testimony supports us for the jury assuredly favored this defendant in nothing. Nothing can be plainer than that it was safer to strain the wire from the street and the qualification added by the witness Alexander, and referred to by the lower court as the probable basis of a qualification by the jury, that he could not *complete* the work there is superfluous. Let him do the more dangerous work below and then mount the car and box to complete it by making the fastenings. There is no dispute at all that to pull from the top of the box was downright perilous.

As to Dixon's being at work out of the scope of his employment, that, we think, will not seriously be urged after the statement of this part of the case already made by us.

The complaint alleged (p. 3) that Dixon had been specially ordered to this particular repair. This is overwhelmingly disproved out of his own mouth. (p. 44) Nor can it be said that, even though he went of his own suggestion, he was still out of his duties. That, as we have said, the record clearly disproves. He had been doing work outside the barn for several months.

The doctrine of law is that a servant assumes the risks only of his employment, and that when he is called out of

that employment to do something else he does not assume the additional risks. This doctrine is meant to give protection to servants who, of a sudden, are summoned to some new or temporary service, to lend a hand for a time at another machine, or to take another's place during a brief absence. Even then the doctrine is by many courts not favored when, as here, the additional service is not shown to be more hazardous than the regular service, or when the servant understands it just as well. However, apply the doctrine here favorably to Dixon. Can he come within it? It certainly cannot be meant to cover cases where the servant, perfectly competent to do so, performs the additional services, whether frequently or infrequently, during from two to four months by his own admission, without objection, under a general order. No court ever has gone to such an extent as that. Why? Because it would not be just. Because it would be nearly impossible to extend a servant's regular duties.

The longer this case is examined the more clear will it be that, if Dixon had received only a slight injury by this accident, such as a broken limb, no court would have held his employer liable for that obscure defect, occasioned so long before, the wire in safe use for more than a year before the accident, the servant an electrician by his own complaint and admittedly taking the place of highest and of needless exposure in the performance of the work.

The State Supreme Court says the evidence was conflicting. Does it mean it was conflicting as to contributory negligence? We do not think it was. Five experienced men swore that the dangerous part of the work could be done from the street. The State Supreme Court would offset this with (p.) the remark of one witness that it was not safe anywhere. But does not our own common sense

say that it is infinitely less dangerous, if one is to be knocked down in any event, to receive the blow on the street rather than eighteen feet in the air on the top of an unsecured box? One other defense of its view is offered by the lower court (p. 118), the remark of one witness, Burroughs, that it was not the usual thing to pull from the street. But why should the servant not impose care on himself? Besides, why should Burroughs' casual remark outweigh the five other witnesses? The preponderance, aided by our common sense is too great. The State Supreme Court had itself previously decided that *some* testimony is not to outweigh the obvious preponderance. *Guley & Northwestern Car Co.*, 7 *Wash., St. 491.*

On the whole case the opinion of the lower court is all the more to be complained of, because since the opinion here they have, without even referring to this, decided the other way in a case strikingly similar. *Anderson vs. Inland Telephone Co.*, 53 *Pacific Rep. 657.*

The judgment of the lower court should be reversed.

Respectfully,

FREDERICK BAUSMAN,

Counsel for Plaintiff in Error.

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Supt. Bur. of Publications for U.S.

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vs.

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SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Frederick Bausman,
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THE JURISDICTION OF THIS COURT.

While our original brief has perhaps fully covered the principles on which the writ of error here should be sustained, the very recent decision of this court in *Capital National Bank of Lincoln vs. First National Bank* (No. 72 of this term), decided so recently as not to have been seen by us before our departure for Washington city, suggests further comment.

That case, we think, can be clearly distinguished from this. There the receiver (of a national bank) was sued, not on anything affecting his existence, but by one who claimed

that something not belonging to the assets of the defunct bank had become intermingled with the assets that had passed into his hands. That he, the receiver, had, in his official capacity, committed a wrong for which he was officially liable, and which would tend to encumber or destroy him, was never maintained. This the Chief Justice was in his opinion careful to note. "The decision" [of the State court], says he, on page 4 of the Record copy, "did not purport to affect the assets of the bank * * * or in any way interfere with the disposition of assets actually belonging to the bank ——— *nor did it affect the receiver as receiver.*" × × × .

Now this clearly emphasizes what we have contended for in the present case. Here the whole charge is that the receiver, *as* receiver, is liable. In the discharge of his official duties he is alleged to have committed a wrong; to have been guilty of a tort which everything in his hands is liable to satisfy as a preferred charge. It is a suit that tends to annihilate the officer. He is not defending here as the successor in interest of the company, but as himself the wrongdoer, an officer of the United States courts. Denying that he has done wrong as such an officer, he sets up the due execution of his official functions, and this constitutes a *right* specially claimed under a Federal authority and within the meaning of the 25th section of the judiciary act.

It will be noticed also that the receiver in the bank case did not, apparently, put the lower court in a position to pass upon the Federal question of his existence, if that could in such a case be called in question at all. He did not move for a decree in his favor. Here the receiver moved that verdicts be directed for him, the defendant, thus calling for

a decision by the lower court as to whether the Federal officer was, as a proposition of law under all the facts, guilty of the tort.

As the plaintiff in this case claims to have been a Federal employé himself, the receiver's servant, and as the receiver defends as a Federal officer, that class of cases should be borne in mind where jurisdiction results here, because both parties claim under Federal authority.

One thing more. It was suggested from the bench during argument that the removal act of 1875, through which, for the first time in a century, Federal officers got the right of removal from State courts to the Federal circuit courts, might be an admission that the original act of 1789 was defective in its 25th section; that it had perhaps been discovered that the latter section had not given Federal officers writs of error from the highest State courts in every kind of instance, and that the removal to the circuit courts was then bestowed by way of remedy. To this we respectfully offer three replies: First, no decision of any court that we know of had at that time suggested that the 25th section needed any such supplement, so far as Federal officers were concerned; second, Federal officers were in no way referred to in it, and the only way that Federal officers availed themselves of that removal act at all was under "questions arising under the laws of the United States;" third, the supplement, if such it were intended to be, was clearly inadequate, since it still left Federal officers at the mercy of State courts in the present class of cases if the amount involved were under two thousand dollars.

Our own opinion is that the act of 1875 was merely cumulative, and for a good purpose cumulative. The Federal mar-

shal or other officer should have the right, if he so desired, to seek the courts of his own Government more speedily than under writ of error to the highest State court. But his rights to the latter remained. Those rights had been bestowed long before removal had been allowed to an officer. We cannot believe that the sagacious Ellsworth ever intended, when he withheld the right of removal from Federal officers, that in any class of cases whatever they should be both without removal and without appeal to the courts of the Government that created them.

Respectfully submitted.

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